United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

77-7227

United States Court of Appeals

FOR THE SECOND CIRCUIT

THE MUSLIM COMMERCIAL BANK LTD.,

Plaintiff-Appellee,

v.

M. GOLODETZ & COMPANY and WATERMAN STEAMSHIP CORP.,

Defendants.

UNITED STATES COURT OF APPEALS
FILED
AUG 30 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PUBALI BANK, RUPALI BANK, SONALI BANK and ADAMJEE JUTE MILLS, LTD.,

Plaintiffs-Appellants,

v.

M. GOLODETZ & COMPANY and WATERMAN STEAMSHIP CORP.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

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Defendants.

APPELLANTS' REPLY BRIEF

The telling force of appellants' points are demonstrated almost as much by Muslim Bank's attempts to dismiss them out of hand with such unflattering appellations as "disingenuous", "ludicrous" and "bizarre", and to distort appellants' factual presentation,* as by the substantive content of those points.

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* For example, appellants' statement that M. Golodetz & Company, a New York firm, was an "intermediary buyer" of jute (Appellants' Brief, p. 4), is simply ignored by Muslim Bank to enable it to suggest that appellants withheld that information from the Court. (Appellee's Brief, p. 10)

Advocacy cannot, however, alter the fact that this Court has before it an important policy question, never before decided by an American Court, i.e., whether it is appropriate to apply American substantive law to the confiscation by a belligerent state of enemy alien property located outside the United States, merely because an essentially foreign transaction involving the confiscated property had some contact with the United States. This far-reaching issue is not one to be determined based upon the colorful adjectives of counsel, but by reasoned analysis as to what delimiting lines, if any, are to be drawn to circumscribe the imposition by the United States of its moral precepts, as embodied in its public policy, on other sovereign states.

The Application of United States Public Policy

It is the core of Muslim Bank's argument that, by the submission of a dispute to the jurisdiction of this Court, the parties implicitly consent to the application of the substantive law of the forum, even if the only contact with the forum is the institution of the litigation. (Appellee's Brief, pp. 10-12) Surely, this assertion must be hyperbole since, if the proposition were to be taken seriously, it would destroy the fundamental underpinnings of prescriptive jurisdiction and the law of conflict of laws. (See Appellants' Brief, pp. 7-8) Nor is Muslim Bank assisted by its strained cataloguing of tangential contacts of the transaction with the forum. By any rational test, Bangladesh was the gravitational center of the transaction; the Dominican Republic was secondarily involved as the locus of the jute underlying the bills of lading in issue. (See Appellants' Brief, p. 9)

Muslim Bank, without legal authority to support its position, also suggests that having instituted its action here, it has somehow earned a vested right to a determination on the merits. (Appellee's Brief, p. 14) The mere positing of this novel proposition is to refute it.

As the caption suggests, there are two cases here which have been consolidated for trial, one brought by Muslim Bank, and a similar case thereafter brought by the Bangladesh claimants. Since the Court owes no obligation to any litigant to apply law repugnant to the forum's fundamental public policy, should this Court conclude that United States public policy bars recovery, the case brought by the Bangladesh claimants is dismissible.* The consequence of the dismissal is that it "merely denies a remedy . . .". *Bradford Elec. Light Co.* v. *Clapper,* 286 U.S. 145, 160 (1932). However, the use of public policy as a shield in the litigation brought by Bangdalesh does not suggest the appropriateness of its use as a sword in the suit brought by Muslim Bank. A foreign litigant can not achieve the application of United States public policy to effect a disposition on the merits merely by having the ingenuity to initiate suit here.

Muslim Bank attempts to derive comfort from the language of the Restatement (Second), Conflicts of Law, Section 90, which states:

> "No action will be entertained on a foreign cause of action which is contrary to the strong public policy of the forum." (Appellee's Brief, pp. 12-13)

It is evident that the "no action will be entertained" language means just that. The Court will not entertain the action. It does not suggest that the Court will apply local policy to effect a disposition on the merits.

Regardless of how one tries to tilt the facts, fundamentally the instant case remains one involving the sale of jute by a Bangladesh seller to a Dominican buyer, through the offices of an American commission merchant acting as inter-

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*No purpose would be served by repetitious response to Muslim Bank's assertion in its Point III that the expropriation by Bangladesn violated fundamental United States public policy. This has already been fully dealt with in Point III of appellants' brief.

mediary. The jute was shipped directly from what is now the People's Republic of Bangladesh to the Dominican Republic. While the jute was in the possession of a Dominican national, and while physically situate in the Dominican Republic, the confiscation was effected. The bills of lading representing the goods never left Bangladesh. The contest before this Court is between nationals of Bangladesh and Pakistan.

The relief requested by Muslim Bank in its capacity as plaintiff is unprecedented. Both *United Bank Ltd.* v. *Cosmic International, Inc.*, 542 F.2d 868 (2d Cir. 1976), and *Republic of Iraq* v. *First National City Bank*, 353 F.2d 47 (2d Cir. 1965), cert. denied, 382 U.S. 1027 (1966), relied upon by Muslim Bank, are decisively distinguishable from the instant case. In both cases this Court was dealing with the attempted confiscation of an asset physically present within the United States and thus entitled to constitutional protection, including the public policy deriving from the Constitution. *Republic of Iraq* v. *First National City Bank*, 353 F.2d at 51-52.

It is admirable for the United States to hold the candle so that the nations of the world can better perceive, appreciate and hopefully adopt those policies fundamental to our society.* It is quite another matter to impose those policies in a specific situation occurring on distant shores in the midst of a bloody war in which the United States was neutral.

The Act of State Doctrine

Muslim Bank attempts to dissipate the force of the Act of State Doctrine by urging that while admittedly the negotiable bills of lading were expropriated in Bangladesh, the jute which they represented "was in the hands of CEA, the

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* Ironically, as pointed out in Point III of appellants' brief, under the instant facts, United States policy would not be very different than that of Bangladesh.

ultimate purchaser, in the Dominican Republic. . . ." (Appellee's Brief, p. 17) While appellants have already dealt at length with the act of state issue (Appellants' Brief, Point II), one facet of Muslim Bank's response calls for comment.

Muslim Bank argues that the Act of State Doctrine requires, for its application, not only that the negotiable documents of title be present in the expropriating state, but that the chattels they represent be similarly positioned. Appellants have already demonstrated that the expropriation of documents of title passes title to the underlying chattels. (Appellants' Brief, pp. 11-14) But, assuming arguendo that title does not pass by the expropriation of title documents because the chattels were outside the acting jurisdiction, it does not follow that the Act of State Doctrine is inapplicable. The purpose underlying the Act of State Doctrine is the avoidance of judicial interference with the sovereignty of independent states within their own borders. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964). Simply put, if the legality of the acts of Bangladesh impacting personalty in the Dominican Republic are to be questioned, it is for the Dominican Republic to so determine under Dominican law. By applying United States law, the District Court thus acted contrary to the spirit, if not the letter, of the Act of State Doctrine. It is no less an interference with the sovereignty of an independent state for this Court to declare that an attempted transfer by a third state of property located within the independent state's borders is void as against United States public policy, than for this Court to make a like declaration with respect to a state acting totally within its own borders.

No authority cited by Muslim Bank speaks to the contrary. Its authorities all deal with assets located within the jurisdiction of the forum. Indeed, the quotation from the *Zwack* case by Muslim Bank (Appellee's Brief, p. 18)

begins with the statement "where firm assets existing *in the forum* are concerned . . .". *Zwack* v. *Kraus Bros. & Co.*, 237 F.2d 255, 259 (2d Cir. 1956). (Emphasis added)

Policy and precedent dictate that the Act of State Doctrine be applied in the instant case.

CONCLUSION

For the foregoing reasons and those set forth in appellants' main brief, the decision of the District Court should be reversed.

Dated: New York, New York
August 25, 1977

Respectfully submitted,

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